FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MADERA IRRIGATION DISRICT,
Plaintiff-Appellant,
NATURAL RESOURCES DEFENSE COUNCIL, et al.,
Intervenor-Appellee,
and
CHOWCHILLA WATER DISTIRICT
Plaintiff
v.

No. 91-16013
D.C. No.
CV-S-91-242-LKK

LAWRENCE F. HANCOCK, as Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; DENNIS UNDERWOOD, as Commissioner of Reclamation, United States Department of the Interior, and MANUEL LUJAN, JR. as Secretary of the Interior of the United States of America,
Defendants-Appellees.

AMENDED
OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
June 8, 1992-San Francisco, Califomia

Filed February 2, 1993
Amended: March 8, 1993

APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit.

Before: Arthur L Alarcon, Cynthia Holcomb Hall and Andrew J. Kleinfield Circuit Judges.

Opinion by Judge Kleinfeld; Concurrence by Judge Hall

COUNSEL

Denslow Green, Green, Green and Rigby, Madera, California for plaintiff-appellant Madera Irrigation District.

Robert L. Klarquist, United States Department of Justice Washington, D.C., for defendants-appellees Lawrence F. Hancock et al.

Brian E. Gray, San Francisco, California, for intervenor appellees Natural Resources Defense Council, et al.

OPINION

KLEINFELD, Circuit Judge:

Madera Irrigation District sued for a declaratory judgment and injunction, to prevent the United States from changing the terms of its water purchases when Madera renewed its contract. The district court dismissed for failure to state a claim. We conclude that the government has the power to impose the particular requirements at issue, and affirm.

I. Facts.

In 1939, Madera Irrigation District sold land and San Joaquin River water rights to the United States. As part

of the consideration, the United States promised to build the Friant Dam and the Madera Canal and enter into contracts, when the project was completed, to sell Madera a permanent supply of 270,000 acre Feet of water annually. The parties agreed that "it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dan and Reservoir." Contract for Purchase of Property and Water Rights at 13 (May 24, 1939) [hereinafter the "1939 Contract"].

In 1951, when construction was done, Madera and the government entered into a forty year contract for purchase and sale of water. They agreed upon a "permanent" supply, but a contract term of forty years. Prices were limited to no more than $3.50 per acre-foot for "class one water," a dependable supply out of the first 800,000 acre feet from the project, and $1.50 for "class two water," a residue to be supplied if available but which was not expected to be as dependable. Under the 1951 contract and "under succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir." Contract Between the United States and the Madera Irrigation District for Water Service and Construction of a Distribution System at 9 (May 14, 1951) [hereinafter the "1951 Contract"]. The 1951 Contract provided that "[t]he executory portions of the 1939 contract . . . shall remain in full force and effect." *Id.* at 8.

As the end of the forty year term approached, the parties began negotiation of the renewals. The irrigation district claims that two provisions in the proposed new contract violate its rights under the previous contracts. First, the government insists upon an addition to the rate in the renewal contract of an amount which would recoup the excess of operation and maintenance costs under the 1951 contract over the rates charged during that forty year term.. Second, the government insists upon a term in the renewal contract which might require an environmental impact statement and Endangered Species Act consultation, with possible subsequent modifications to the contract.

The dates illuminate the issues. When Madera transferred its land and its water rights to the federal Government, federal policy favored reclaiming desert land for agriculture by subsidizing irrigation water, to settle the West and create a class of independent family farmers. *See Peterson v. U.S. Dept. Interior*, 899 F.2d 799, 802-807 (9th Cir.), cert. denied, 111 S. Ct. 567 (1990); Barcellos and Wolfson, Inc. v. Westlands Water Dist., 899 F.2d 815 (9th Cir.), cert. denied, 111 S. Ct. 555(1990); *United States v. Tulare Lake Canal Co.*, 535 F.2d 1093, 1119 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). As the Great Depression lingered in the late 1930's, Congress and the President may have been more concerned with expanding economic opportunity than avoiding subsidy. Nothing like the National Environmental Policy Act or Endangered Species Act were in the law in 1902 when the Reclamation Act became the law, or 1939 when Madera traded its land and water rights for government promises.

Congress can change federal policy, but it cannot write on a blank slate. The old policies deposit a moraine of

contracts, conveyances, expectations and investments. Lives, families, businesses, and towns are built on the basis of the old policies. When Congress changes course, its flexibility is limited by those interests created under the old policies which enjoy legal protection. Fairness toward those who relied on continuation of past policies cuts toward protection. Flexibility, so that government can adapt to changing conditions and changing majority preferences, cuts against. Expectations reasonably based upon constitutionally protected property rights are protected against policy changes by the Fifth Amendment. Those based only on economic and political predictions, not property rights, are not protected. Our task is to determine whether the renewal provisions insisted upon by the government violated Madera's Fifth Amendment property rights.

We review de novo dismissal of an action for failure to state a claim, treating the averments of the complaint as though they were established to test whether, if true, the claim would entitle the plaintiff to relief. *Albert Bld. Corp. v. United States*, 951 F.2nd 191, 195 n.8 (9th Cir. 1991).

II. Operation and Maintenance Costs

The irrigation districts claim that the change in the price term, to recover maintenance and operation costs which were not charged in the 1951-1991 period, is improperly retroactive. The government insists upon a provision in the renewal contract which would recover with interest the subsidy in operations and maintenance costs accumulated during the old forty year contract. In so doing, the executive branch is carrying out a policy enunciated by Congress. Congress passed a statute re-

quiring the recoupment for Central Valley Project irrigation districts such as Madera.

> The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley project water contractor in the payment of operation and maintenance costs of the Central Valley project is repaid by such contractor under the terms of such new or amended contract, together with interest on any such deficit which arises on or after October 1, 1985 . . . .

Water Resource and Small Reclamation Projects Act, Pub. L. No. 99-546, §106, 100 Stat. 3050, 3052 (1986).

Madera was entitled to buy water for a maximum of 3.50 and $1.50 per acre-foot under its 1951 contract. The government conditions renewal on payment during. the renewal contract of millions of dollars for operation and maintenance costs incurred during the 1951 contract term. The effect, as Madera sees it, is that it will be paying more than the $3.50 and $1.50 price ceilings for its water purchased under the 1951 contract.

Madera argues that the charges cannot be imposed, for two reasons. First, it had and has a contractual right to pay no more than $3.50 and $1.50 per acre-foot for water under the 1951 contract, and the charges retroactively require it to pay more. Second, it has a contractual right to pay no more for water than other districts, and the charges would cause its price to be higher than that charged to other districts. Madera does not dispute that Congress has adopted a policy which requires recovery of operations and maintenance costs with inter-

est, and does not urge any construction of the Central Valley Project statute which would exclude Madera's renewal contract from its operation.

We accept Madera's general proposition that a valid contract right of an irrigation district against the United States is property protected by the Fifth Amendment. *Lynch v. United States*, 292 U.S. 571, 579 (1934); See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Rights against the United States arising out of a contract are property rights protected from deprivation or impairment by the Fifth Amendment. *Barcellos and Wolfson, Inc. v. Westlands Water District*, 899 F.2d 814, 821 (9th Cir. 1990). The Due Process Clause limits the exercise of sovereign power which would impair obligations under government contracts. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1387 (9th Cir.), cert. granted, 113 S. Ct. 490 (1992). To demonstrate a wrongful taking or impairment, Madera must establish that it has cognizable property rights arising out of its contracts with the government, and that the government has abrogated its contractual rights. *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Corp.* 470 U.S. 451, 472 (1985); *Barcellos and Wolfson*, 899 F.2d at 821.

Two general principles constrain our interpretation. First, we must "construe legislation in a constitutional manner 'if fairly possible.'" *Knapp v. Cardwell*, 667 F.2d 1253, 1260 (9th Cir.) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)), cert. denied, 459 U.S. 1055 (1982). Second, we must construe a contract with the government to avoid, if possible, foreclosing. the exercise of sovereign authority. Sovereign power " 'will remain intact unless surrendered in unmistakable terms.' " *Bowen v. Public Agencies Opposed to Social*

Security Enactment, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982)); *Peterson v. U.S. Department of Interior,* 899 F.2d 799, 807 (9th Cir.) cert. denied, 111 S. Ct. 567 (1990). These two principles compel a construction somewhat more liberal toward the government than might be appropriate were the contract a purely private transaction. They enable it to change, not just execute past policies. But too liberal an interpretation of the residual sovereign power of the government to override its contractual commitments would eviscerate the government's power to bind itself to contract.. In addition to the moral offensiveness of allowing, the government to break its promises, too liberal a construction would have the paradoxical consequence of weakening the sovereign power to implement policy. See *Perry v. United States,* 294 U.S. 330, 351-54 (1935). If the government's commitments need not be honored, then it can induce responses to policies only by cash or coercion.

A. Right to Renewal.

The government offers a broad justification for the operation and maintenance charges and all the other changes at issue which we cannot accept. It urges that Madera had no renewal right under the 1951 contract, so the government was free to offer renewal on any terms. We cannot reconcile that with the terms of the 1939 and 195 1 contracts. Madera did not exchange its land and its water rights for a forty year supply of water. It exchanged them, as its 1951 contract recites, for a "permanent" supply of water. Section 4 of the 1951 contract expressly provided for renewal at the expiration of the forty year term and terms for the "succeed;ng contracts":

> **The executory portions of the 1939 contract . . . remain and shall remain in full force and effect, and the parties, upon the expiration of the term of Part A hereof, shall be entitled to all of the rights conferred upon them by article 14 of the 1939 contract and shall be subject to all of the terms and conditions of said article except as the aforesaid 1939 contract may be abrogated or amended by specific reference thereto and mutual agreement of the parties: . . . Under this Part A and under succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir.**

1951 Contract at 8-9. Section 14 of the 1939 contract provided, inter alia, for future purchases of water:

> **(e) Whenever the United States shall be prepared to furnish service for irrigation or other purposes from Friant Reservoir .. ., the United States shall notify the District in writing relative to the availability and character of such service, and shall define the classes and quantities of service then and thereafter to be made available and the respective prices and methods of payment therefor. The District shall have six (6) months from the date of receipt of said notice within which to contract for the purchase of water on the basis of the classes and quantities of service so offered to the District; *provided*, that, having due regard for the District's procedure required or expedient in negotiating. for and securing approval of such contract, the Secretary may grant such extensions of time as he deems desirable. It is mutually understood between the parties hereto that it is not**

possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the cost of said water to the District shall not exceed charges made to others than the District for the same class of water and service from the said Friant Dam and Reservoir.

1939 Contract at 13. Section 4 of the 1951 contract amended the 1939 contract, and as amended, it expressly provides for renewals after the forty year term:

> The District shall have six (6) months [after the termination of Part A [of the 1951 contract] and within six (6) months after the termination of each term provided for in succeeding contracts] within which to contract for the purchase of water on the basis of the classes and quantities of service so offered to the District; *provided*, that, having due regard for the District's procedure required or expedient in negotiating for and securing approval of such contract, the Secretary may grant such extensions of time as he deems desirable.

1939 Conlract at 13; 1951 Contract at 8-9. This provision guarantees Madera certain rights after the expiration of the 1951 contract. It has a vested propety right to a permanent water supply based on express provisions of its contracts. *Cf: Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1385-86 (9thCir. 1992), (express provisions of contract supported by independent consideration, not merely legislative provisions, create vested property rights), cert. granted, 113 S. Ct. 490 (1992). The question is not whether its rights exist, but whether they are being violated.

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B. Retroactivity.

The government and amici argue that Madera's contract and the Reclamation Act always contemplated that Madera would pay the cost of the water, and the subsidy was accidental. so the purpose of the contract is served by the recoupment of the operating and maintenance deficits. We cannot reconcile this argument with the ceiling price in the 1951 contract. When parties contract for a price not to exceed a certain dollar figure, that necessarily carries the implication that the seller bears the risk that its, costs will exceed that ceiling. A government contract supported by consideration to pay a subsidy is legitimate and enforceable. *Cf. Alpine Ridge Group v. Kemp,* 955 F.2d 1382, 1383 (9th Cir. 1992), (upholding contracts obligating government to subsidize low income housing rents), cert. granted, 113 S. Ct. 490 (1992). The promise to subsidize if necessary may be an instrument of policy designed to induce people to do things they otherwise would not do, such as transfer water rights and land to the United States, settle in the West and start a farm, or invest in an existing farm and equipment. We will not construe away the unmistakable term establishing a ceiling price in the 1951 contract on the ground that it granted an unintended subsidy.

[11 Nevertheless, we conclude that the recoupment of the operations and maintenance expense does not violate Madera's rights under the 1951 contact. Madera got its water during: the forty year term, and need pay no more for the old water than the price to which it agreed. Were it to buy no more water, it would owe no more money for the operations and maintenance expense. The recoupment will be a factor in the price of water under the renewal contract. The price of the new water will be calculated in such a way as to recoup a

subsidy previously granted, as though the subsidy were a debt, but the subsidy is not owed like a debt. Madera has no obligation to repay it. The means by which the price of new water will be established looks retroactively at the costs of supplying the old water, but Madera could not be forced to pay the money in the absence of a renewal contract, so it is a charge for new water calculated on the basis of the old water, rather than an additional charge for the old water.

The difference between a retroactive means of calculating the price of new water, and a retroactive charge for the old water, becomes clearer when one thinks about the people to whom Madera will pass on the charges. Most of the farmers who used the more heavily subsidized water during the first two decades of the 1951 contract have probably sold out and retired by now, and some of them have probably died. They are not going to get billed for their share of the operations and maintenance costs deficit. Instead, many of the people to whom they sold their farms will pay more than they expected in the future for water. In practical effect, the recoupment of the operations and maintenance charge is entirely a burden on future rather than past purchasers of water, and largely on those who expected the subsidy rather than those who received it. The people who got the subsidy can keep the profits they earned from their crops based on the cheaper water, and they can also probably keep, unless their contracts provide otherwise, the money they received from the buyers of their farms attributable to the expected water subsidy. The burden of what the statute calls recovery of a deficit will fall largely on people other than the beneficiaries. The practical effect is a sharp policy shift, arguably disruptive of well founded expectations, but it is not retroactive.

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Since the Central Valley Project is: a product of policy rather than the market, there is: no market measure of the value of the water. Price was a matter of policy, when it was a subsidy to settle the West by turning the deserts green and creating a class of family farmers to populate them, when it was an element in the attempt to revive the economy during the Great Depression, and now, when the subsidy may be eliminated or may flow in the opposite direction, as a tax upon users of the water. For all we know, some supporters of the changes may have felt that farms should turn back into desert, and the West should be depopulated, and saw a policy of raising the price of water beyond cost by an increment representing seller's remorse for the old subsidy as an instrument to achieve this objective. We lack the authority of the political branches to make these sorts of policy choices. Reasonable expectations arising out of past policy but without a basis in cognizable property rights may be honored by prudent politicians, because to do otherwise might be unfair, or because volatility in government policy will reduce its effectiveness in inducing long term changes in behavior. But violation of such expectations cannot give rise to a Fifth Amendment claim. *Peterson v. U.S. Dp't. of Interior*, 899 F.2d 799, 812-13 (9thCir.), cert. denied, 111 S. Ct. 567 (1990). Although Congress cannot take back a subsidy for which it has bound itself by contract, it may nevertheless quit subsidizing, and even tax the previously subsidized activity, once its contractual obligation to subsidize ends. The additional charge for new water is no more than that.

C. Higher rates than others.

Madera also pleads that as a result of the government's calculation of the operation and maintenance

deficit, it will be required to pay more for water than other Friant Dam districts. The practical effect of a higher maintenance and operations charge against Madera will be that an acre-foot of new water will cost more in the Madera Irrigation District than in some other Central Valley Project districts.

[2] We find this the most troubling issue in the case. It is distinct from the retroactivity question. Under the 1939 and 1951 contracts, Madera is entitled to rate equality with other districts on renewal:

> Under this Part A and under succeeding contracts the rates to be charged the District for water service shall not exceed charges made to others than the District for the same class of water and service from Friant Dam and Reservoir.

1951 Contract at 9; see 1939 Contract at 13. Our analysis of the retroactivity issue compels the inference that the recoupment must be treated as part of the price for new water, not part of the price for old water. Madera purchasers will pay more per acre-foot for new water under the renewal contract than purchasers in other districts, assuming. that Madera's operation and maintenance cost recoupment is higher.

The two general principles of avoiding unconstitutionality and construing contracts to preserve sovereign authority nevertheless compel us to reject Madera's argument. 'The contractual words, "for the same . . . service" preserve Congressional authority to require a different charge for different service. Service requiring more expensive operation and maintenance is different from service requiring less expensive operation and maintenance. The equality promised applies to "rates,"

and the 1951 contract puts rates in section 7, and operation and maintenance cost in a separate section 15, evidently contemplating in section 16 that the irrigation district would take over operation and maintenance. This suggests that the parties did not intend that Madera's operation and maintenanoe cost could not exceed that of other districts.

Congress decided in the plainest terms to change its policy, so that instead of buying subsidized water, purchasers of the new water will have to pay its full operation and maintenance costs, plus an increment measured by the subsidy furnished to purchasers of the old water. We are unable to say that by the words, "shall not exceed charges made to others than the District for the same class of water and service," the government's sovereign authority to charge more for water service with a higher operation and maintenance cost was "surrendered in unmistakable terms." *Peterson v. United States Dep't. of Interior, 899* F.2d 799, 807 (9th Cir. 1990), cert. denied, 111 S. Ct. 567 (1990).

D. Credits Since 1956.

Madera also argues that the Secretary errs in accounting for the operations and maintenance costs during the 1951 contract term. A 1956 statute requires that the Secretary credit the district for amounts paid in excess of operation and maintenance costs properly chargeable to that irrigation district. See 43 U.S.C. § 485h-1(3) (1983). Madera pleads that the Secretary failed to give it the credits from 1956 to 1988, and then adopted new cost allocation criteria in 1988 which increased the charges to Madera to a rate higher than other districts. The district court correctly pointed out that Madera did not plead entitlement to a credit. Rather, Madera

averred these facts in the context of its claim that the operation and maintenance charges were being imposed retroactively and in a manner which generated higher water rates for Madera than other districts. In the context in which it was pleaded, the claim is subsumed by our determination that the recoupment is not an invalid retroactive charge or rate higher than that of other districts. We therefore have no occasion to determine whether the government correctly computed Madera's share of operating costs and its credits, and the question whether it has is not decided in this lawsuit.

III. The Environmental Requirements.

The United States has also required a term in Article 14 of the new contract that provides:

> (c)(l) The Secretary has undertaken the San Joaquin Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763. (2) The United States and the Con tractor [Madera] agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and a consultn-tion in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley Project and with the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA

consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, that the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14(c). Notwithstanding any other provision of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of water are non-discretionary and not subject to change except as required by applicable law.

[3] Madera argues that the language, "that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor," makes the contract offered to them a nullity, and so deprives Madera of its right to a renewal contract. We agree with Madera's legal proposition, that the government cannot reserve to itself an unlimited right to escape its contractual obligations "without rendering its promises illusory and the contract void." *Torncello v. United States*, 681 F.2d 756, 760 (Cl. Ct 1982). Here, though, the reserved power to modify is limited. The modification power is qualified by the words, "in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, That the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14(c)." The government, like any contracting party, can enter into a binding agreement subject to a qualified right of modification or other avoidance of obligations. *Cf: Modern Sys. Tech. Corp. v. United States*, 24 Cl. Ct 699, 701 & n.3 (Cl. Ct.

1992), (upholding government's exercise of "termination for convenience" clause which permits government to terminate a contract at will), aff 980 F.2d 745((Fed Cir. 1992).

Both of the laws pursuant to which the government reserves rights under the proposed language are new. The National Environmental Policy Act and the Endangered Species Act were promulgated after the 1951 contract was executed, and represent policies subsequently adopted. Madera claims that its renewal rights cannot be burdened with these new policies. That proposition goes too far. The constitutionally permissible burden will depend on what the general policies may turn out to mean in application.

Madera argues that section 203(d) of the Reclamation Reform Act of 1982 prevents the imposition of these environmental regulations. See 43 U.S.C. 9 390cc(d) (1988). This section provides that -

> Amendments to contracts which are not required by the provisions of this subchapter shall not be made without the consent of the non-Federal party.

Id. Madera cannot take advantage of this provision, because the government seeks a term in a new contract, not an amendment to an existing contract. The renewal contract provision in the 1951 contract does not say that all the terms in a renewal contract must be identical to the expired contract. Whether the environmental terms added into the renewal threaten the proprietary rights preserved in Madera's contract, a permanent right to a certain amount of water at rates no higher than those charged to other purchasers of the same class of water and service from Friant Dam and Reservoir, depends on

how the environmental provisions are implemented. The government has not " 'surrendered in unmistakable terms' " its power to impose any environmental laws on the contractual relationship, so the required clause is not necessarily violative of Madera's contractual rights. *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

We need not and do not reach the question of what environmental requirements are permissible. As the Department of the Interior has construed it, the new paragraph 14 would not require the environmental impact statement and endangered species consultation prior to signing the renewal contract. The government proposes to renew the contract with the new provision explicitly reserving its authority to impose the requirements of the two environmental acts, subject to Madera's reservation of rights. This evidently is a construction of the "accordance with" language, inferring from these words that to the extent such review is not required by the statutes it is not required by the contract. Currently the parties are in litigation in another case, because the Secretary proposes to renew prior to any such environmental review, and the environmental advocacy groups which are intervenors and appelees before us claim in that case that the environmental review must precede renewal. In light of the government's application of the clause, the question of applicability of the two environmental laws to Madera's renewal contract is not yet a ripe controversy, in the Article III sense, so we lack jurisdiction. *Broughron Lumber Co. v. Columbia River Gorge Com'n* 975 F.2d 616, 621 (9th Cir. 1992).

AFFIRMED.

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HALL, Circuit Judge, Concurring:

I concur in parts I and III of the majority's opinion. As to the issues: raised in part II, I concur in the result, but on the ground very ably set forth by the district court: The Appellants' right to purchase water from the government is subject to subsequent legislation affecting the exercise of that right.

Sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' Therefore, contractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Bowen v Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 147 (1982)). "[C]ontracts should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Id. at 52-53.

Appellants' asserted property right in the rates set in the 1951 Contract ultimately rests on the argument that by virtue of the 1939 and 1951 Contracts, Congress has surrendered its right to exercise its sovereign power to legislate and the executive's obligation to act in conformance with legislation. Examination of Appellants' contracts fails to disclose the requisite unequivocal surrender of sovereignty. *See Peterson v.United States Dep't of Interior*, 899 F.2d 799, 808 (9th Cir.), cert. denied, 111 S. Ct. 567 (1990). Rather, the language of the contracts appears to reserve Congress' right to exercise its sovereign power. Both provide that they are executed

pursuant to the 1902 Federal Reclamation Act and all acts amendatory or supplementary thereto. 1939 Contract at 1; 1951 Contract at 1. The 1939 Contract explicitly recognizes that the Appellants' right to purchase water is subject to both congressional action and implementation by regulation. 1939 Contract at 12, 14.

Appellants point to language in the 1951 Contract providing that the Secretary may set the water rates annually "but in no event shall the rates so announced be in excess" of $3.50 and $1.50 per acre-foot for Class One and Class Two water, respectively. 1951 Contract at 13 (emphasis added). This language is insufficient to unmistakably surrender Congress' right to legislate. It is doubtful that the Secretary of the Interior could, by contract, waive the right of Congress to pass laws; but in any case, it does not appear that such a waiver was even contemplated. As stated above, the contracts were made pursuant to the Reclamation Act and statutes amending or supplementing the Act by their own terms. Furthermore, the initial contract recognized that the United States would unilaterally determine the price Appellants would pay for water. 1939 Contract at 12-13. Assuming for the moment that the reference to water rates in the 1951 Contract is even applicable to the imposition of operation and maintenance costs, in this context, the words "in no event" may be interpreted to men "in no event under the current legislative regime" or "in no event unless Congress legislates otherwise" would the Secretary adjust cost-sharing arrangements.

The Reclamation Act itself required that Appellants pay an appropriate share of operation and maintenance costs. See 43 U.S.C. § 485h(e) (1988). Congress amended the Act to require a cost sharing adjustment.

See Water Resource and Small Reclamation Projects Act, Pub. L. No. 99-546, § 106, 100 Stat. 3050, 3052 (1986). Appellants' argument that the rates fixed in a contract made pursuant to statute preclude the government from collecting operation and maintenance costs as clearly compelled by statute cannot prevail.

Similarly, to the extent the charges result in a total water cost to Appellants that exceeds the final cost of water to other users, the contracts allow such a result when brought about by reclamation legislation. This conclusion is further supported by other contractual provisions indicating that the parties intended the district to bear its own operation and maintenance costs for the distribution network extending from the canal. See 1951 Contract at 25-27. Thus, the district must have contemplated that its bottom-line water cost would differ in some respects from the absolute water cost of other users of Friant Dam water. The contract must be interpreted to require only that the rate per acre-foot of water is the same to each irrigation water user. Even if the contracts did not explicitly acknowledge that they were subordinate to statute, the doctrine of reserved sovereign power would compel the same conclusion. The language of the contracts does not unequivocally surrender Congressional power to charge the district for the actual cost of operating and maintaining the Madera Canal.

Accordingly, the district court's order should be affirmed.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MADERA IRRIGATION DISTRICT
CHOWCHILLA WATER DISTRICT,

NO. CIV. 5-91-242 LKK

Plaintiffs,

v. ORDER

LAWRENCE HANCOCK, etc., et al.,

Defendants.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Intervenors.

This matter is before the court on defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, and on plaintiffs' motion for preliminary injunction.[1] For the reasons I now explain, plaintiffs' complaint is DISMISSED without prejudice pursuant to Fed. R. Civ. P. 12 (b) (6) for

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[1]Prior to the May 31, 1991 hearing on these motions, the court granted proposed defendants-in-intervention Natural Resources Defense Council ("NRDC",), et al., leave to file briefs as amici curiae. on May 20, 1991, the court granted the proposed intervenors' application to file an answer in intervention. Intervenors join in the United States' motion to dismiss, and oppose plaintiffs' motion for preliminary injunction.

failure to state a claim upon which relief may be granted.

In their first amended complaint for declaratory and injunctive relief ("FAC"), plaintiffs Madera Irrigation District("Madera") and Chowchilla Water District ("Chowchilla") allege that defendants Lawrence Hancock, Regional Director of the United States Bureau of Reclamation, Dennis Underwood, commissioner of Reclamation of the United States Department of the Interior, and Manuel Lujan, Secretary of the Interior, owe plaintiffs a duty, arising out of a 1939 contract between Madera and the Bureau of Reclamation, to renew contracts for water service from the Central Valley Project ("CVP") without certain language which defendants require be included. Plaintiffs assert that the defendants' insistence that this language be included in renewal contracts violates their constitutional rights guaranteed by the due process clause of the Fifth Amendment and the contract clause of Art. I, §10, as well as federal reclamation law. Plaintiffs also seek a declaration that operation and maintenance ("O&M") charges imposed on them by defendants are unauthorized by law, violate the terms of plaintiffs' water service contracts, and violate the same constitutional provisions.

I.
FACTS AND BACKGROUND

A. The 1939 Contract

To facilitate construction of the Friant Dam and Reservoir as part of the Central Valley Project, the Madera Irrigation District entered into a contract on May 24, 1939, under which it sold to the United States a dam site and certain water rights. The 1939 Contract

was explicitly executed pursuant to the Federal Reclamation Act of 1902, "and acts amendatory or supplementary thereto." Contract for Purchase of Property and Water Rights, May 24, 1939, ¶ 1 (hereinafter "1939 Contract"). The contract recognized that Madera intended to purchase supplemental water from the CVP when it was completed, and gave it the right to do so.[2] Moreover, although the price of the water could not be determined at the time of the contract's execution, the government agreed that it would not exceed that charged other purchasers.[3] Performance of the contract was made contingent upon Congress making appropriations necessary for completion of the project. 1939 Contract ¶ 17.

Subsequent to execution of the 1939 Contract, the Chowchilla Water District was formed from land withdrawn from Madera. On August 24, 1949, with the consent of the United States, a partial assignment of the 1939 Contract was made to that district.

B. The 1950 and 1951 Water Service Contracts

On July 5, 1950, the United States and Chowchilla entered into a 40-year contract providing

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2 "The District shall be entitled, as hereinafter provided, to purchase a supplemental supply of water from Friant Dam and Reservoir [in a specified annual amount] . . . . Contracts for water shall be subject to a set of regulations to be issued by the Secretary prior to the execution of any such contracts . . ." 1939 Contract ¶ 14(a) & (d).

3 "It is mutually understood between the parties hereto that it is not possible at this time to fix a price to be paid by the District for said water, but the United States agrees that the costs of said water to the District shall not exceed charges made to other than the District for the same class of water and service from the said Friant Dam and Reservoir." 1939 Contract ¶ 14(e).

water from the CVP to Chowchilla. Contract Between the United States and the Chowchilla Water District Providing for Water Service, July 5, 1950 (hereinafter "1950 Contract") . Like the 1939 Contract, the 1950 Contract explicitly provides that it is made in pursuance of the Federal Reclamation Act of 1902, "and all acts of Congress amendatory thereof or supplementary thereto, collectively herein styled the 'Federal reclamation laws.'" Id. at p.1. The 1950 Contract acknowledged the desire of Chowchilla to purchase water from the project, [4] and provides that it constituted a fulfillment of obligations under Article 14 of the 1939 contract.[5] The 1950 Contract specifies a price of $1.50 per acre-foot for Class 2 water, and $3.50 per acre-foot for Class 1 water. Id. at ¶ 6(a). The 1950 Contract expired on February 28, 1991. FAC ¶52.

On May 14, 1951, Madera and the United States entered into a water service contract with terms substantially similar to the Chowchilla agreement. Contract Between the United States and the Madera Irrigation District for Water Service and Construction of a Distribution System, May 14, 1951 (hereinafter

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[4]The District desires to contract, pursuant to the Federal reclamation laws . . . for the furnishing by the United States of an additional water supply from the Project, for which the District will make payment to the United States upon the basis, at the rates, and pursuant to the conditions hereinafter set forth. . . ." 1950 Contract at p.3.

[5] The executory portions of the 1939 contract, as modified by the assignment of August 24, 1949 . . . shall remain in full force and effect except those provisions of the aforesaid 1939 contract which may be abrogated or amended by specific reference thereto and mutual agreement of the parties: Provided, that this contract, during the term thereof, shall constitute full satisfaction of all of the District's rights under article 14 of the aforesaid 1939 contract . . . ." 1950 Contract ¶ 3.

"1951 Contract") As with the 1950 Contract, the 1951 Contract explicitly provides that it is made pursuant to the Federal reclamation laws. Id. at p.1. The 1951 Contract acknowledges that the parties desire to provide for the continued delivery of water,[6] but added a provision that

> The United States recognizes that the District in contracting to transfer and surrender its properties and rights hereinabove referred to relied upon its right to purchase a permanent supplemental supply of water from Friant Dam and Reservoir and the agreement that the United States would construct the facilities described subject to the terms and conditions set forth in the 1939 contract.

Id. at p.4. Finally, the 1951 Contract provides for a right of renewal upon its expiration on May 14, 1992, with terms entitling the district to the rights conferred upon it by the 1939 Contract[7].

On July 10, 1989, Chowchilla and the United States agreed to amend the 1951 Contract as follows:

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[6]The District desires to contract for the purchase and the United States desires to contract for the furnishing to the District of the said quantity of water that the District is now entitled to purchase under the 1939 contract subject to the terms and conditions contained in said 1939 contract and the Federal reclamation laws . . . and for which the District will make payment to the United States upon the bases, at the rates, and pursuant to the conditions hereinafter set forth. 1951 Contract at page 3.

[7] Under the 1951 Contract, it was agreed that Madera "shall be entitled to all of the rights conferred upon them by article 14 of the 1939 contract and shall be subject to all of the terms and conditions of said article except as the aforesaid 1939 contract may be abrogated or amended by specific reference thereto and mutual agreement of the parties: Provided, That this contract during [its 40 year term] shall constitute full satisfaction of all of the District's rights under article 14 of the aforesaid 1939 contract." 1951 Contract ¶ 4.

The terms and conditions of each renewal shall be agreed to upon by the earliest reasonable date prior to the expiration of the then existing contract.

FAC at 19.

C. Proposed Article 14(c) (2)

The complaint alleges that on December 20, 1990, Plaintiffs were informed by defendants that any water service renewal contract would contain language recognizing the Secretary's obligation to conform the contracts to the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). The proposed clause, however, reserved to the plaintiffs the right to challenge any modification of the contracts premised upon those obligations.[8]

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[8] The proposed language is as follows:

" (c) (1) The Secretary has undertaken the San Joaquin River Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763."

" (2) The United States and the Contractor agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley Project and the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: Provided, That the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14 (c). Notwithstanding any other provisions of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of

Plaintiffs allege that:

> By only offering to execute a "contract" with Madera and Chowchilla which contained the language of Article 14 giving the Secretary the unilateral right to modify and amend the terms of the contracts without the consent of the districts, Defendants failed to perform their legal statutory and contractual obligations to renew Madera and Chowchilla's Water Service Contracts in that the "contract" offered is a legal nullity.

FAC ¶ 49. In addition to their claim that Article 14(c)(2) violates the due process clause of the Fifth Amendment, plaintiffs assert that the Secretary's insistence that Article 14 be included in their renewal contracts violates the Reclamation Reform Act of 1982 ("RRA"), 43 U.S.C. § 390cc(d).

II.
JURISDICTION

Defendants move to dismiss plaintiffs' claims relating to Article 14 for lack of subject matter jurisdiction. First, defendants assert that the question of the inclusion of Article 14 in plaintiffs' renewal contracts is not yet ripe for adjudication. Second, they argue that the court does not have subject matter jurisdiction over plaintiffs' Article 14 claims because there is no "final agency action" permitting eview under the Administrative Procedure Act, 5 U.S.C. §§ 701 et sec. ("APA") Third, defendants contend that plaintiffs' Article 14 claims cannot be reviewed under the APA because the Tucker Act, 28 U.S.C. §§ 1491 et seq., is a statute which "expressly or impliedly forbids the relief

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water are non-discretionary and not subject to change except as required by applicable law."

which is sought." 5 U.S.C. § 702. Finally, defendants argue that the court lacks jurisdiction because the United States has not waived its sovereign immunity from suit. I address defendants jurisdictional arguments seriatim.

A. Ripeness

By virtue of the case or controversy provision of Article III of the United States Constitution, a federal court may not adjudicate a case unless the issue presented is "ripe" for judicial review. Ripeness turns on "the fitness of the issues for judicial decision" and the "hardship to the parties of withholding court consideration." *Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Dev. Comm.*, 461 U.S. 190, 201 (1983) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)).

Defendants assert that plaintiffs' claims relative to Article 14 (c) (2) are not ripe for review because defendants have not yet attempted to unilaterally amend plaintiffs' water service renewal contracts. Withholding consideration works no hardship on plaintiffs, defendants argue, because the terms of Article 14(c)(2) grant plaintiffs the right to challenge defendants' subsequent amendments to the contract. Plaintiffs complaint, however, is that defendants' insistence that Article 14(c) (2) be included in any water service renewal contract executed between the parties interferes with the plaintiffs' existing rights under the 1939 Contract, and under the Constitution.

The court is satisfied that the question of whether the inclusion of Article 14 (c) (2) violates plaintiffs' rights is ripe for judicial decision. It is true that Article 14 (c) (2) preserves plaintiffs' right to attack the legality of any future amendments, but the preservation of

that issue is beside the point. Plaintiffs complain about the inclusion of the clause itself, and by executing a water service renewal contract with proposed Article 14(c) (2) , plaintiffs would perforce waive their right to object to that provision. The defendants' motion to dismiss plaintiffs' complaint on this basis is DENIED.

B. Sovereign Immunity

In the absence of an explicit waiver, claims against the federal government are barred by sovereign immunity. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 (9th cir.), cert. denied, 474 U.S. 931 (1985). The administrative Procedure Act waives the United States' sovereign immunity from suit for a claim properly brought under the Act. See 5 U.S.C. § 702. Moreover, when suit is properly brought pursuant to the APA, jurisdiction exists by virtue of 28 U.S.C. S 1331. *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

Both plaintiffs and Intervenors argue that sovereign immunity is waived by virtue of the APA . I do not agree. The plaintiffs' claims relative to waiver under the APA falter by virtue of the preclusion of review provisions of the Act. The waiver of sovereign immunity under the APA is limited by the proviso that "nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C.§ 702. Thus although the APA waives sovereign immunity and 28 U.S.C. § 1331 confers jurisdiction for claims under the APA, the waiver is subject "to preclusion-of-review statutes created or retained by Congress." *Califano*, 430 U.S. at 105.

The Tucker Act provides the United States Claims Court with jurisdiction over any claim against the United States founded . . . upon any express or implied contract with the United States. 28 U.S.C. § 1491(a)(l). The district court exercises jurisdiction concurrently with the claims court over contract claims against the United States involving less than $10,000. 28 U.S.C. §1346(a)(2). The Tucker Act thus provides a limited waiver of sovereign immunity and prescribes the remedies available in actions on government contracts. *North Side Lumber*, 753 F.2d at 1484-85 (citing *Mesapulse. Inc. v. Lewis*, 672 F.2d 959, .967 (D.C. cir. 1982)). Under the Tucker Act as originally adopted, the claims court could grant money damages, but neither injunctive relief, *United States v. Jones*, 131 U.S. 1 (1889), nor declaratory relief. *United States v. Kina*, 395 U.S. 1 (1969). Although the Ninth Circuit has twice held that the Tucker Act "does not preclude review of agency action when the relief sought is other than money damages," *Laquna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th cir. 1981) ; *Rowe v. United States*, 633 F.2d 799, 802 (9th cir. 1980), cert, denied, 451 U.S. 970 (1981). in *North Side Lumber*, a panel of the court limited those cases to their facts, holding that the claims asserted although contract-related "rested at bottom on statutory rights." *North Side Lumber*, 753 F.2d at 1485. The court then extended the restrictions on the relief the claims court may award in contract actions to district courts, holding that "the Tucker Act 'impliedly forbids' declaratory and injunctive relief and precludes a §702 waiver of sovereign immunity in suits on government contracts." Id. The current jurisdictional statute permits the claims court to grant declaratory relief in contract claims brought before the contract is awarded, and to grant limited equitable relief, 28 U.S.C. § 1491(a) (2)-(3) ; see also *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988).

Remarkably, the Circuit has rejected the proposition that section 1491(a) expands the jurisdiction of the district court. *Price v. United States General Services Administration,* 894 F.2d 323, 324 n.4 (9th cir. 1990).

The United States argues that plaintiffs' claim here is, at bottom, based on contract. It thus concludes that under *North Side Lumber* the court may not grant declaratory or injunctive relief on plaintiffs' claims.

Plaintiffs and Intervenors rely on Judge Wallace's concurring opinion in *Pacificorp v. Federal Energy Regulatory Commission,* 795 F.2d 816, 825-27 (9th cir. 1986), to distinguish *North Side Lumber* from the matter at bar. Judge Wallace observed there that "jurisdiction under the Tucker Act is not exclusive where other statutes independently confer jurisdiction and waive sovereign immunity." Id. at 826 (citing *Munoz v. Small Business Administration,* 644 F.2d 1361, 1364-65 (9th Cir. 1981)) . Plaintiffs and Intervenors point to 43 U.S.C. §390uu and argue that the section both confers subject matter jurisdiction on the court and waives sovereign immunity. I agree.

Section 390uu waives the United States' sovereign immunity in a suit to "adjudicate, confirm, validate, or decree" the rights of a contracting entity and the United States regarding any contract executed pursuant to the Federal reclamation laws.[9] Despite the defendants' ar-

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[9]43 U.S.C. § 390uu provides: "Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law. The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders,

guments to the contrary, section 390uu applies to the dispute before the court because plaintiffs have asked the court to adjudicate their rights under the 1939, 1950 and 1951 Contracts executed with the United States pursuant to the Federal reclamation laws.

In *Bostwick Irrigation District v. United States,* 900 F.2d 1285, 1287 (8th Cir. 1990), plaintiff irrigation districts brought a declaratory judgment action under 43 U.S.C. § 390uu, seeking to "enjoin the Bureau of Reclamation . . . from charging the Districts for expenses incurred . . . for operation and maintenance of a dam and reservoir." Without exploring the basis for jurisdiction, the court held that the Bureau was authorized by statute to collect operation and maintenance costs, and that the water user's contracts with the Department of Interior require repayment of those costs. Id. at 1289-90. *Bostwick's* lack of analysis makes it weak authority for the proposition that section 390uu is an unequivocal grant of subject matter jurisdiction over disputes involving interpretation of contracts executed pursuant to Federal reclamation law. Nonetheless, the language of the statute and its legislative history demonstrate that the Eighth Circuit reached the correct conclusion.

It is true that section 390uu could be read very narrowly as a venue provision rather than as conferring subject matter jurisdiction. This possibility however, is resolved by an examination of the legislative history of section 390uu. See *Mid Valley Bank v.*

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and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved in situated."

North Valley Bank, ___ F. Supp.___ (E.D. Cal. May 21, 1991) sl. op. at 9 (in the absence of authoritative construction ambiguity of statute first to be resolved if possible by resort to legislative history). The Senate report on the bill specifically notes that the section is a jurisdictional grant. See S. Rep. No. 373, 97th Cong., 2d Sess. 18, reprinted in 1982 U.S. Code Cong. & Admin. News 2570, 2572[10]

I conclude, following Judge Wallace's reasoning in *Pacificorp*, that plaintiffs' claims are not precluded by the Tucker Act because section 390uu provides an independent jurisdictional basis and waiver of sovereign immunity.

III
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Both the United States and Intervenors move to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. That motion must be granted.

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10 The report reads in pertinent part "[t]his section gives the consent of the United States to be sued concerning the contractual rights of persons or entities who are parties or beneficiaries of water service or repayment contracts. . . - In some instances, written representations were made to the water users concerning the interpretation of the reclamation law or of contract provisions which may have influenced the water users' decision to consummate the contract. This section provides access to the courts for parties or beneficiaries seeking to reform such contracts to be in accord with the terms of such representations or other appropriate relief. The conditions of this permission are clear in the text." S. Rep. No. 373, 97th Cong., 2d Sess. 18, reprinted in 1982 U.S. Code Cong. & Admin. News 2570, 2582.

A. Standard

On a motion to dismiss, the allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks International Ass'n v. Shermahorn*, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. Id. See also *Wheeldin v. Wheeler*, 373 U.S. 647, 648 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *Hishon v. King & Spaulding*, 467. U.S. 69 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the laws in ways that have not been alleged.'" *Associated General Contractors v. California State Council*, 459 U.S. 519, 526 (1983).

B. Article 14(c) (2) Claims

In their first three claims for relief, plaintiffs allege that defendants owe them a duty, arising out of the 1939 Contract and 43 U.S.C. § 485 et seq., to renew their water service contracts. FAC ¶ 60. Plaintiffs al-

lege that defendants' attempt to include the proposed Article 14 in their renewal contracts violates 43 U.S.C. § 390cc(d) and plaintiffs' rights under the Fifth Amendment due process clause.[11]

1. Section 390cc(d)

Plaintiffs' claims resting on 43 U.S.C. § 390cc cannot be reconciled with the language and structure of that section.[12] Under the statute, subsection (d) applies only to subsections (a) (2) and (3) , which describe "amendments" to existing contracts. Because subsection (d) applies to amendments, by its terms, it does not apply to new contracts, including renewal contracts entered into after October 12, 1982. Because subsection 390cc(d) does not apply to renewal contracts, plaintiffs cannot rely on it to state a claim for relief relative to the language the government proposes to include

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11 It is unclear whether plaintiffs also allege a claim under, the contract clause, Art. 1, § 10 of the United States, Constitution. Because the contract clause does not apply to the federal government, *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 807 n.15 (9th cir.), cert. denied, ___U.S. ____ 112 L. Ed. 2d 574 (1990), to the extent that plaintiffs do assert such a claim, defendants' motion to dismiss is granted.

12 Section 390cc provides in pertinent part: "(a) Generally. The provisions of this subchapter shall be applicable to any district which--

(1) enters into a contract with the Secretary subsequent to October 12, 1982;

(2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or

(3) which amends its contract for the purpose of conforming to the provisions of this subchapter. . . .

(d) Consent of non-Federal party. Amendments to contracts which are not required by the provisions of this subchapter shall not be made without the consent of the non-Federal party." 43 U.S.C. § 390cc.

in their renewal contracts. Thus plaintiffs have failed to state a claim under section 390cc.

2. Due Process

Plaintiffs also assert that the inclusion of proposed Article 14 (c) (2) in their renewal contracts would constitute a deprivation of property without due process of law prohibited by the Fifth Amendment to the United States Constitution.[13] Plaintiffs' memo in support of motion for preliminary injunction at 16-18. Defendants seek dismissal on various grounds.

As a threshold matter, defendants and Intervenors argue that the plaintiff irrigation districts are not "persons" within the meaning of the due process clause of the Fifth Amendment. According to defendants, because the states are not persons within the meaning of the clause, *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966), irrigation districts, as state agencies, may not assert Fifth Amendment claims.

At least one district court has concluded that it is doubtful that *South Carolina v. Katzenbach* applies to state-created public corporations like water districts. *Metropolitan Water District of Southern Cal. v. United States*, 628 F. Supp. 1018, 1023 n.6 (S.D. Cal. 1986), rev'd on other grounds, 830 F.2d 139 (9th cir. 1987), aff'd sub. nom. *California v. United States*, 490 U.S. 920 (1989). Id. As Judge Brewster noted, corporations are "persons" within the meaning of the Fifth Amendment, and water districts are public corporations. Id.; see also *Truckee-Carson Irrigation District v.*

[13] The Fifth Amendment due process clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V, cl. 3.

Secretary of Dept. of Interior, 742 F.2d 527 (9th cir. 1984) assuming without deciding that irrigation district is person within meaning of Fifth Amendment), cert. denied, 472 U.S. 1007 (1985). But see *El Paso County Water Improvement Dist. No. 1 v. IBWC/US*, 701 F. Supp. 121 (W.D. Tex. 1988) (concluding without analysis that county water district, a political subdivision of the state, not "person" within meaning of Fifth Amendment). I concur with the reasoning in *Metropolitan Water District*, and conclude that plaintiff irrigation districts are persons within the meaning of the Fifth Amendment due process clause. Having so concluded, I must now determine whether plaintiffs have stated a claim under the Constitution.

Plaintiffs may state a claim under the Fifth Amendment due process clause only if they possess a property right protected by the Constitution. *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 807 (9th Cir.), cert. denied, ___U.S.___112 Ed. 2d 574 (1990). Plaintiffs assert that they have a property right to a continued supply of project water assured to them by the 1939 contract when they assigned the dam site and the water rights on the San Joaquin River to the United States." Plaintiffs' memo in opposition to defendants' motion to dismiss at 22:4-7. Plaintiffs argue that they are entitled under the 1939 Contract to a renewal contract, and that the proposed Article 14(c)(2), because it permits unilateral amendment, renders the contract a "legal nullity." Id. at 22:7-10.

The Secretary proposes to include the disputed Article 14 (c) (2) in plaintiffs' renewal contracts in order to fulfill his statutory obligations under NEPA and ESA. Article 14(c)(2) provides that plaintiffs' water service renewal contracts "are subject to modification by the United States, after public meetings and

discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation" conducted pursuant to NEPA and ESA. The proposed article, however, preserves plaintiffs' right to challenge the legality and validity of any such modifications made to [the] contract pursuant to this subarticle 14(c)."

Plaintiffs' asserted property interest in a water service renewal contract ultimately rests on the suppressed predicate that by virtue of the previous contracts Congress has surrendered its right to exercise its sovereign power to legislate, and the executive's obligation to act in conformance with legislation. I cannot agree. As I now explain, while plaintiffs may have a right to purchase a supplemental supply of water from the government, derived from their exchange of water and dam site rights in the 1939 Contract, plaintiffs' right is subject to subsequent legislation affecting the exercise of the right.

The Supreme Court has explained that while the government may enter into contracts conferring vested rights "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("POSSE") . Accordingly, contractual arrangements, including those to which the government itself is a party, "remain subject to subsequent legislation by the sovereign. Id. In sum, it is established that Congress is not prohibited from enacting legislation simply because it affects the government's contractual agreements. Id.; *Federal Housing Administration v. The Darlinton, Inc.*, 358 U.S. 84, 90 (1958).

An examination of plaintiffs' 1939, 1950 and 1951 Contracts fails to demonstrate an unequivocal waiver of the right to legislate. See *Peterson*, 899 F.2d at 808.[14] Indeed, the language of the contracts appears to reserve Congress' right to exercise its sovereign power. All three contracts provide that they are executed pursuant to the 1902 Federal Reclamation Act, and all acts amendatory or supplementary thereto. 1939 Contract ¶ 1; 1950 Contract at p.l; 1951 Contract at p.l. In addition, the 1939 Contract explicitly recognizes that the plaintiffs' right to purchase water is subject to both congressional action and implementation by regulation.[15]

Plaintiffs rely on *United States v. Larionoff*, 431 U.S. 864, 878-79 (1977), for the proposition that defendants may not include article 14 (c) (2) in plaintiffs' renewal contracts. *Larionoff* held that Congress may not retroactively abrogate a right established under a cont-

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14 It is, to say the least, doubtful that the executive could by contract waive the right of the legislative branch to pass laws. Rather, it would appear that the plaintiffs would have to point to a congressional waiver. Because plaintiffs have failed to do so, but rather rely on contractual documents, I examine the contracts and conclude above that no unequivocal waiver may be found there either.

15 The 1939 Contract provides as follows: "(2) Contracts for water shall be subject to a set of regulations to be issued by the Secretary. . . ;

(3) The United States . . . shall define the classes and quantities of service then and thereafter to be made available and the respective prices and methods of payments therefor;

(4) In the event the performance, in whole or in part, of the obligations of the respective parties under this contract, is hindered, interrupted or prevented by war. . . or by other similar or different acts of civil or military authorities, . . . the obligation of the respective parties under the contract shall be suspended. . . . ;

(5) It is understood that this contract is made contingent upon Congress making the necessary appropriations . . . ."

ract. Id. That holding simply does not bear upon the power of Congress to prospectively alter rights under a contract. In the matter at bar, the Secretary seeks to reserve the right to alter prospectively plaintiffs' contract rights when required to do so in order to comply with the statutory mandates of NEPA and ESA. In the absence of an express waiver of the right of the United States to exercise its sovereign powers, plaintiffs have failed to establish that they have a vested property right to renewal contracts which do not include Article 14 (c) (2) .

For the reasons explained above, I conclude that plaintiffs have failed to state a claim for relief under 43 U.S.C. § 390cc(d) or the Fifth Amendment due process clause. Defendants' motion to dismiss plaintiffs' first three claims for relief is GRANTED.

C. Operation and Maintenance Charge Claims

Section 106 of Pub. L. No. 96-546 requires Central valley Project water contractors to repay any annual operation and maintenance ("O&M") deficit incurred after 1985 at a specified rate.[16] In their fourth claim for relief, Plaintiffs seek a declaration that the

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16 The statute provides: "The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the payment of operation and maintenance costs of the Central Valley Project is repaid by such contractor under the terms of such new or amended contract together with interest on any such deficit which arises on or after October 1, 1985, at a rate equal to the average market yields' on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the applicable reimbursement period of the project, adjusted to the nearest one- eighth of 1 percent." Water Resource and Small Reclamation Projects, Pub. L. No. 99-546, S 106, 1986 U.S. Code Cong. & Admin. News 100 (Stat.) 3052.

0&M charges which defendants seek to impose under the statute are unenforceable against plaintiffs.

The O&M charges in dispute are the difference between the 1950 and 1951 Contract rate of $3.50 per acre-foot for Class 1 water and $1.50 per acre-foot for Class 2 water, and what the United States has determined was the actual cost of operation and maintenance of the CVP chargeable to Madera and Chowchilla during the term of those contracts. FAC ¶ 55. The amount of 0&M charges for Madera through 1989 totals $3,495,360, and for Chowchilla, $2,311,921. Id.

The plaintiffs attack the imposition of 0&M charges on a variety of grounds. They allege that retroactive imposition of the proposed 0&M charges is a breach of the 1950 and 1951 Contracts because they result in rates greater than those contracted for in those agreements. Plaintiffs also allege that the charges breach the 1939 and 1951 Contract provisions assuring that these plaintiffs would be charged at rates no greater than those charged other districts within the Friant Dam service area. The 0&M charges are also said to be a breach of contract because they are alleged to include charges for operation and maintenance of the Madera Canal despite the fact that under the 1939 Contract the United States agreed to build the Madera. Canal for the delivery of water to the district

Although plaintiffs do not challenge the actual calculation of the 0&M deficit, they assert that the timing and manner of calculation is improper. They assert that the defendants had an obligation under 43 USC § 285h-1(3) to calculate and credit any overpayment made by the Plaintiffs. According to the complaint, the defendants delayed doing so and then, in 1988, adopted new pricing criteria which resulted in a

retroactive increase "to a rate higher that other districts in the Friant Service Area." FAC ¶ 56(e).

Finally, plaintiffs allege that .the 0&M charges violate rights protected by the contract and due process provisions of the Constitution. I address each theory in turn.

1. Rates Inconsistent With Contract Provisions

Plaintiffs first claim that the 0&M charges are inconsistent with the rates provided for in the various water service contracts. Plaintiffs point to the provisions of the 1950 and 1951 Contracts which provide:

> The contracting officer will, on or before February 15 of each calendar year, by a written notice, announce to the District the rates of payment to be made by the District for all water to be delivered to it pursuant to this contract during the ensuing year, but in no event shall the rates so announced be in excess of three dollars and fifty cents ($3.50) per acre-foot for Class one water and one dollar and fifty cents ($1.50) per acre-foot for Class two water.

They argue that under the terms of the contracts, 3.50 and $1.50 are the maximum rates they may be charged for the delivery of water. The complaint then alleges that "the imposition of the operation and maintenance deficit results in a doubling or tripling of these charges for many years." FAC ¶56(a). These allegations fail to state a claim.

As noted above, by their own terms, all the contracts entered into between the plaintiffs and the United States were made pursuant to the Reclamation Act

and statutes amending or supplementing the Act. Both the Reclamation Act itself and Public Law 99-546, require that plaintiffs pay a share of 0&M. The Act requires that contracts "to furnish water for irrigation purposes . . . shall be . . . at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operating and maintenance cost. 43 U.S.C. § 485h(e). The statute further provides that any contract, relating to construction charges "shall require advance payment of adequate operation and maintenance charges." 43 U.S.C. § 485e. These statutes require the Secretary to set rates which in his opinion suffice to recapture an appropriate amount of operation and maintenance charges. Because the rates set in fact failed to recapture 0&M, the 1986 amendment requires that any annual deficit outstanding or hereafter arising must be repaid. Pub. L. No. 99-546r § 106 (emphasis supplied). Plaintiffs' argument that the rates fixed in the contracts preclude the government from collecting 0&M charges cannot lie. The contracts recognized that they are subordinate to the reclamation statutes and their amendments, and those statutes and amendments clearly compel the payment by the plaintiffs of proportionate 0&M charges.[17]

Although plaintiffs do not make an argument predicated upon the notion that the statutes do not mandate a recapture of a proportionate share of all 0&M actual expended by the government, such an argument could be made. Thus it could be argued that 43 U.S.C. § 485h(e) does not require the Secretary to establish a charge equal to a proportionate share of 0&M,

[17]Even if the contracts did not recognize that they were subordinate to the statutes, under the court's analysis of reserved sovereign power, supra, the result would be the same.

but only an appropriate share. From that language, it could be argued that the Secretary was not required to charge the full amount, but rather was granted discretion to charge a lesser amount upon unspecified standards. Finally, it could be suggested that in executing the contracts with the districts at a fixed amount the Secretary had exercised that discretion, and thus discharged his statutory duty. While such an argument appears to the court to be more coherent than any actually made by the plaintiffs, as I now explain, I do not think it can prevail.

Even assuming arguendo that the contracts relied upon by plaintiffs represented an exercise of discretion authorized by the original Reclamation Act, section 106 of Pub. L. No 99-546 requires that renewal contracts ensure that any outstanding deficits in the payment of 0&M are repaid. The court must acknowledge that this obligation is also not without ambiguity. Thus an outstanding deficit may refer to charged but unpaid 0&M obligations rather than the difference between the amount charged for water service and the actual 0&M cost. This ambiguity, however, has been resolved by the Secretary's determination as to the meaning of the statute inherent in the charges challenged here. Such a contemporaneous administrative determination is, under appropriate circumstances, entitled to deference from the court. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984) ; see also *Catholic Social Services. Inc. v. Meese*, 685 F. Supp. 1149, 1152 (E.D. Cal. 1988) (administrative interpretation entitled to deference if "linguistically possible . . . and . . . consistent with the statutory purpose") . Interpreting section 106 to require recapture of a proportionate share of actual 0&M is certainly consistent with the statutory language and nothing before the court suggests such an

interpretation is inconsistent with the statutory purpose.

For all the above reasons, I conclude that plaintiffs' allegation that the 0&M charges are inconsistent with the specified contract price must fail.

2. Prices No Higher Than Charged Other Districts

Plaintiffs point to those provisions of the 1939 and 1951 Contracts which provide in substance that the rates to be charged them shall not exceed charges made to others for the same class of water and services. See 1939 Contract ¶ 14 (e) ; 1951 Contract ¶ 4. Plaintiffs have not alleged that the calculation of 0&M charges is faulty, only that it results in delivery rates exceeding those charged others in the service area. While it is true that the water service contracts contain such provisions, once again they are subject to the reclamation statutes and their amendments. Because the Reclamation Act and Public Law No. 99-546 require the imposition of 0&M charges to the extent those charges result in a rate for delivery of water to these plaintiffs greater than that charged other users the contracts, in effect, contemplated such a result.

3. Failure to Comply With Section 485h-l

The plaintiffs allege that the defendants delayed performance of their obligation under section 485h-1(3) to calculate overpayment of 0&M from July 2, 1956 until 1988. They then allege that when such determinations were made the Secretary 'adopted new pricing criteria thereby increasing the proposed charges to Madera and Chowchilla to a rate higher than other districts in the Friant service area." Once again, the districts do not claim a deficiency in the calculations.

Rather, the districts maintain that the defendants' alleged delay and calculation procedure somehow prevents application of § 106 of Public Law No. 99-546.

The court is, to say the least, perplexed by the allegations. The plaintiffs make no attempt in their Points and Authorities in Opposition to the Motion to Dismiss to defend this claim. Moreover, neither in their complaint, nor in their briefing, do plaintiffs claim that they were entitled to a credit because they in fact overpaid.

Given the fact that plaintiffs have not sought to defend this allegation, it may well be that they have sub silentio conceded that dismissal is appropriate. In any event, plaintiffs' silence seems quite appropriate. The statute provides the Secretary with broad discretion to fix rates such that the revenues produced will be sufficient to cover both 0&M and fixed charges. 43 U.S.C. § 485h-1(3).[18] Any credits to which plaintiffs would be entitled to apply only after a district has paid its appropriate share" of operation and maintenance costs. 43 USC § 485h-(c). While the statute requires the Secretary to credit plaintiffs for operation and maintenance cost over payments, plaintiffs have failed to allege that any such credit was due to them under the statute. Plaintiffs have a continuing obligation to pay maintenance and operation charges. Congress has now directed that when new contracts are executed, contractors are to be charged for preexisting operation and maintenance charges. Given plaintiffs' preexisting statutory obligations incorporated into the contract, and the

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[18]Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. section 485h-1(3).

reserved sovereign power, plaintiffs may not be heard to complain.

Plaintiffs' complaint about defendants' delay and adoption of new pricing criteria also presents no cognizable claim. If the allegation concerning delay is intended to assert either latches or estoppel, so characterized they fail to state a claim. Generally, laches appear not to apply to the government, *United States v. Ruby Co.*, 588 F.2d 697, 705 n.l0 (9th Cir.), cert. denied, 442 U.S. 917 (1979), and the plaintiffs have clearly failed to allege facts rising to the stringent standards required for estoppel. *Office of Personnel Management v. Richmond*, 110 L. Ed. 2d 387 (1990); I 779 F.2d 569r 571-72 (9th cir. 1986). Finally, given the; Secretary's broad discretion to fix rates, noted above, the: plaintiffs' complaint concerning the adoption of new pricing criteria does not appear to present a cognizable claim.

4. Madera Canal Charges

Plaintiffs allege that since the 0&M charges include claims relating to operation and maintenance of the Madera Canal, they breach the 1939 contractual obligation of the United States to build the canal to supply water to the districts. With the greatest of respect this allegation is simply a non sequitor. The agreement of the United States to build the canal certainly does not encompass an obligation to operate and maintain the canal without cost to the district. Moreover, given the statutory obligation of the Secretary to recapture 0&M, the obligation to build the canal cannot be read as creating an ambiguity concerning the intent of the parties relative to operation and maintenance. These allegations state no claim.

5. Constitutional Claims

As noted in the discussion above concerning proposed Article 14(c)(2), plaintiffs can point to no language in the federal reclamation laws or in the contracts themselves that suggests, much less demonstrates, that the government surrendered its sovereign power to legislate in enacting its previous contracts with plaintiffs. In the absence of such a waiver, plaintiffs have no property right under the Fifth Amendment due process clause. Moreover, as noted above, the impairment of contracts provision does not apply to the federal government. Plaintiffs' fourth claim must be dismissed for failure to state a claim upon which relief may be granted

ORDER

For the reasons set forth above, the court hereby grants defendants' motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted. Accordingly, plaintiffs' motion for interlocutory injunctive relief must be DENIED.

Because the court cannot say with certainty that plaintiffs cannot state a claim, they are granted thirty (30) days from the effective date of this order to file an amended complaint. The court urges that if plaintiffs believe the court has erred and have no other theory of recovery, they suffer dismissal and appeal rather than extend these proceedings unnecessarily.

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IT IS SO ORDERED.

DATED: June 14, 1991.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT
COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MADERA IRRIGATION DISTRICT,
CHOWCHILLA WATER DISTRICT,

NO. CIV. 5-91-242 LKK

Plaintiffs,

v. ORDER

LAFiRENCE HANCOCK, etc., et al.,

Defendants.

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

Intervenors

On June 17, 1991 the court entered its order granting defendants' motion to dismiss, and denying plaintiffs' motion for preliminary injunction. The court granted plaintiffs thirty (30) within which to file an amended complaint stating a claim for relief. Plaintiffs have informed the court that they do not intend to file an amended complaint. Accordingly, final judgment is now entered and the clerk of court is directed to close this case.

IT IS SO ORDERED.
DATED: July 1, 1991.

S/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUIDGE EMERITUS
UNITED STATES DISTRICT COURT

CONSTITUTION OF THE UNITED STATES:

The Fifth Amendment due process clause provides:

> **"No person shall . . . be deprived of life, liberty, or property, without due process of law."**

U.S. Const. amend. V, cl. 3

STATUTES:

1. Pub. L. No. 99-546 § 106:

"The Secretary of the Interior shall include in each new or amended contract for the delivery of water from the Central Valley Project provisions ensuring that any annual deficit (outstanding or hereafter arising) incurred by a Central Valley Project water contractor in the payment of operation and maintenance costs of the Central Valley Project is repaid by such contractor under the terms of such new or amended contract together with interest on any such deficit which arises on or after October 1, 1985, at a rate equal to the average market yields' on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the applicable reimbursement period of the project, adjusted to the nearest one- eighth of 1 percent." Water Resource and Small Reclamation Projects, Pub. L. No. 99-546, S 106, 1986 U.S. Code Cong. & Admin. News 100 (Stat.) 3052.

43 U.S.C. § 390uu provides:

"Consent is given to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights of a contracting entity and the United States regarding any contract executed pursuant to Federal reclamation law.

The United States, when a party to any suit, shall be deemed to have waived any right to plead that it is not amenable thereto by reason of its sovereignty, and shall be subject to judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances. Any suit pursuant to this section may be brought in any United States district court in the State in which the land involved in situated."

CONTRACT PROVISION:

Article 14(c)(l)

The Secretary has undertaken the San Joaquin Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763. (2) The United States and the Contractor [Madera] agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and a consultn-tion in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley Project and with the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, that the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to

this subarticle 14(c). Notwithstanding any other provision of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of water are non-discretionary and not subject to change except as required by applicable law.